No. 15,788

IN THE

United States Court of Appeals

For the Ninth Circuit

CITY OF ANCHORAGE, a municipal corporation,
Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

The District Court had jurisdiction over this matter by virtue of 48 U.S.C.A. 101. This court has jurisdiction over this Appeal by virtue of 28 U.S.C.A. Sections 1291 and 1294 (2).

STATEMENT OF THE CASE.

This litigation arose from a contract dated May 18, 1955, entered into by appellant and appellee (TR 6-8), the tenor of which is: That appellee could tie onto the sewer line of appellant and, in consideration for this service would pay appellant, in lieu of taxes, what

taxes on appellee's property would be if appellee were within the city limits of appellant. The word "property" was not defined in the contract. Proceeding under the contract, appellee installed the sewer at its own expense. Appellant did not. Appellant is in error, in its statement of the case, to the effect that the parties stipulated that the sewer line was installed by the City (TR 12; IV of Stipulation).

At assessment time and after the sewer line installed by appellee was put to use, appellant assessed appellee for real property taxes and also for personal property taxes. Appellant did and does contend that appellee is liable for both real and personal property taxes.

Appellee paid the real property taxes but did and does deny liability for personal property taxes.

A dispute having arisen as to liability for personal property taxes, appellant brought an action to enforce the contract, as interpreted by appellant, which was designated Civil Action No. 10-297-C in the Justice Court for the Anchorage Precinct of Alaska (TR 3-9). The substance of appellee's answer to the complaint in 10-297-C was to admit the complaint except to deny liability for personal property taxes (TR 10-11).

To expedite the trial of 10-297-C, appellant and appellee entered into a stipulation (TR 12-17), the substance of which was that the sole question to be determined was whether or not "property" as used in paragraph III of the agreement of May 18, 1955, means real property alone or real and personal property.

At the trial of 10-297-C, the Justice Court considered not only this stipulation of appellant and appellee; but it also heard oral testimony of George C. Shannon and B. W. Boeke, the city manager and clerk, respectively, of appellant, and George D. Jackson, president of appellee, as to the intent of the parties at the time of entering the agreement of May 18, 1955. It was impossible to get this testimony into this record on appeal, because the Justice Court is not a court of record; however, in order that this court might be fully informed, counsel for appellant and appellee have stipulated that this court may consider the fact that, in 10-297-C, George C. Shannon and B. W. Boeke testified that the intent of the parties was that "property" meant real and personal property and George D. Jackson testified that, the intent of the parties was that "property" meant real property alone.

Thus arose the first question, namely: Is appellee responsible to pay appellant an amount equal to real property taxes alone or an amount equal to real and personal property taxes?

From Judgment entered in favor of appellee in 10-297-C, appellant appealed to the District Court in Anchorage, and that appeal is still pending; therefore, the final determination of the above question is yet to come.

Being appealed to the District Court, 10-297-C was redesignated Civil Action No. A-13,001 in the District Court.

In A-13,001, appellant then sought to amend its complaint so as to seek additional forms of relief, namely, reformation of the contract of May 18, 1955, to the effect that "property" means real and personal property and a declaratory judgment enabling appellant to avoid the contract (TR 19-26).

The second question then arose, namely: Can, under the laws of this Territory, such new and additional forms of relief be sought for the first time after appeal from a justice court?

The District Court said, "No;" and denied the amendment (TR 26).

It is noteworthy that the Order denying the amended complaint was entered June 14, 1957 (TR 26); whereas, notice of this appeal was not given until October 7, 1957. Such illustrating the period of time over which appellant has vexed appellee through litigation.

Having been denied the right to amend, appellant thereafter initiated in the District Court in Anchorage, Civil Action No. A-13,503 (TR 27-32), in which appellant sought essentially the same relief as it sought in its attempted amendment in A-13,001, namely: A reformation of the contract of May 18, 1955, to the effect that "property" means real and personal property instead of real property alone, and a declaratory judgment to the effect that appellant was not bound by said contract of May 18, 1955.

Appellee's motion to dismiss the complaint in A-13,-503, although contested by appellant, was successful and resulted in a judgment of dismissal with preju-

dice, September 12, 1957, from which this appeal is taken (TR 32-35). (The Judgment of September 12, 1957, was erroneously labeled "Motion and Judgment of Dismissal with Prejudice").

The entry of this judgment of dismissal in A-13,503 gives rise to the questions to be determined on this appeal, the primary question being whether or not the judgment below should be affirmed, namely:

1. Should a judgment be reversed because the stated reason for its entry is erroneous?

2. As a matter of the policy favoring the expeditious determination of disputes between a single plaintiff and a single defendant, should the judgment below be affirmed?

3. Does the pendency of A-13,001 bar appellant from the reformation relief sought in A-13,503?

4. Is appellant estopped from maintaining A-13,503?

5. Has appellant waived its right to maintain A-13,503?

6. Are there multiple causes of action here or but a single cause of action and multiple remedies?

7. Does the doctrine of election of remedies bar appellant from maintaining A-13,503?

8. What acts constitute a conclusive election under the doctrine of election of remedies?

9. Do the Federal Rules of Civil Procedure bar appellant from maintaining A-13,503?

10. Is appellant barred from maintaining A-13,503 by virtue of the doctrine of *res judicata?*

ARGUMENT.

SHOULD A JUDGMENT BE REVERSED BECAUSE THE STATED REASON FOR ITS ENTRY IS ERRONEOUS?

With respect to appellant's argument I, appellee is confused as to the results sought to be obtained by appellant.

The prayer in appellant's brief (Appellant's Brief p. 16) does not request a reversal of the ruling of the District Court on the motion of appellant to amend its Complaint in A-13,001; and appellant's argument No. I seems directed to the necessity of including items 4 and 5 of its designation of record (Motion for Leave to File Amended Complaint and Amended Complaint Accompanying Motion, plus Minute Order Denying Leave to File Amended Complaint) in order that this court might have the background and information necessary to determine this appeal. Appellee has no objection whatever to this court's considering items 4 and 5 in determining this appeal. However, in appellant's first statement of points relied on (TR 37) and his first specification of error (Appellant's Brief p. 4) and the title to his first argument (Appellant's Brief p. 5) appellant indicates that it desires this court to rule on whether or not the District Court erred in refusing appellant permission to amend its complaint in A-13,001. Appellee submits that such question is not, however, before this court for determination because of the reasons stated in appellee's

objection to appellant's designation of record on appeal and supporting memorandum (TR 43-45).

Appellee interprets appellant's brief, all three of the arguments contained therein, as being to the effect that the judgment appealed from should be upset because of the reason stated by the District Court for entering the judgment, to-wit, *res judicata.* If this interpretation is correct, appellee cannot see how the brief of appellant can be of any aid to this court. The reason stated by the District Court for entering the judgment appealed from is immaterial. The important point is whether or not the judgment appealed from is correct, irrespective of the reasons stated by the district judge for entering the judgment he did, whether the reason be stated in a minute order (TR 34) or otherwise (TR 36).

> "In the review of judicial proceedings the rule is settled, that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. Frey & Son v. Cudahy Packing Co., 256 U.S. 208; U.S. v. American Railway Express Co., 265 U.S. 425; U.S. v. Holt State Bank, 270 U.S. 49, 56; Langnes v. Green, 282 U.S. 351; Stelos Co. v. Hosiery Motor-Mend Corp., 295 U.S. 237, 239; cf. U.S. v. Williams, 278 U.S. 255 . . ."
>
> *Helvering v. Gowran,* 302 U.S. 238 at 245.

> "In that connection, the reasons given therefor by the court, whether right or wrong, are unimportant because: 'A judgment will not be reversed merely because the court gave a wrong reason for the rendition thereof.' Kelley v. Wehn,

> 63 Neb. 410; 88 N.W. 682. . . . As held in Kanaly v. Bronson, 97 Neb. 322, 149 N.W. 781: 'A proper judgment under the pleadings and the evidence will not be reversed on appeal merely because the trial court did not give the right reason for the decision' . . ."
>
> *Sopcich v. Tangeman,* 45 N.W. 2d 478 at 481.

> "it (the opinion) cannot prevail against the final order or decision . . . The presumption exists that all the facts in a record bearing upon the points decided have received full consideration by the court, whether all, a part, or none of these facts are mentioned in the opinion. . . ." (Parentheses ours.)
>
> 21 *C.J.S.* 414, Courts, Section 222(b).

For further authority on this same point, see: 49 *C.J.S.* 51-52, Judgments, Sec. 22; *Kipp v. Clinger,* 106 N.W. 108; *First National Bank in Wichita v. Luther,* 217 Fed. 2d 262 at 266; *People ex rel Holzapple v. Ragen,* 117 N.E. 2d 390 at 393, Certiorari denied 347 U.S. 963; *Brown v. Allen,* 344 U.S. 443 at 459; 30A *Am. Jur.* 169, Judgments, Sec. 15; 3 *Am. Jur.* 563, Appeal and Error, Sec. 1008; innumerable cases in Volume 2 *Sixth Decennial Digest,* 478-483, Key number: Appeal and Error 854 (2).

AS A MATTER OF THE POLICY FAVORING THE EXPEDITIOUS DETERMINATION OF DISPUTES BETWEEN A SINGLE PLAINTIFF AND A SINGLE DEFENDANT, SHOULD THE JUDGMENT BELOW BE AFFIRMED?

Appellant's trail through the courts in connection with the matters involved in this appeal is a long and

devious one. Appellant began a suit to enforce the contract of May 18, 1955, in the Justice Court. Losing, appellant appealed to the District Court (A-13,001); and that action is still pending there. Appellant then sought to inject into A-13,001 additional claims for relief in the nature of reformation and declaratory judgment. Having failed in this attempt, appellant brought a separate action (A-13,503) in the same District Court seeking the identical relief of reformation and a declaratory judgment. The subsequent action (A-13,503) having been dismissed, appellant now appeals to this court. Part of the relief requested by appellant on this appeal is the reinstatement of A-13,-503 with respect to reformation; however, appellant's prayer in connection with reformation in A-13,503 is that it may have judgment "1. That by decree of this court, the above mentioned contract of May 18, 1955, be reformed to conform with the actual agreement of the parties. . . ." (TR 31). As appellant points out in its brief, such is all it asks in connection with reformation, namely: "That the court reform the instrument according to the intent of the parties, . . ." (Appellant's Brief, p. 13). Appellant does not seek to reform the contract *and* enforce the contract as reformed. This prayer for reformation illustrates more vividly than any other act of appellant the condemnable conduct of appellant in submitting appellee to continuous litigation. Under its prayer, apparently, appellant would like to get the contract reformed and a judgment to that effect. It appears that, armed with this judgment, appellant would then like to bring still an additional law suit to enforce the contract in accordance with the judgment previously obtained.

Appellant's conduct throughout these proceedings can in no way be justified in the light of the liberal joinder and pleadings rules of the Federal Rules of Civil Procedure; and its conduct conclusively establishes appellant's contempt for, and disregard of, every legal principle involved in the doctrines of *res judicata,* election of remedy, estoppel, waiver, circuitous actions, multiplicity of suits, and any other doctrine seeking to expeditiously dispose of controversial matters arising out of a single transaction at a single time.

> "The procedural rules are designed to eliminate multiplicity of suits and to dispose of all claims between the parties on one proceeding."
>
> *Vahle v. Markham,* 5 F.R.D. 315 at 317.

> "State practice to the contrary notwithstanding, the present federal procedure contemplates the disposition at one time of all rights and liabilities arising out of a single event, so far as disposition may be possible and practical."
>
> *Sinkbiel v. Handler,* 7 F.R.D. 92 at 97.

> "Public policy demands that a multiplicity of suits be not maintained even by a party entitled to maintain them when one suit would suffice. . . ."
>
> *Cold Metal Process Company v. United Engineering & Foundry Company,* 190 Fed. 2d 217 at 222.

The application of this policy against multiple suits or continuous vexing of the defendant in court is particularly applicable in this case for two reasons:

1. In the case at bar we have a factual situation where appellant could, at the time it brought its suit in the Justice Court, have sued in the District Court, not only to enforce the contract but to reform the contract and enforce it as reformed and also for a declaratory judgment. Appellee feels that it is of primary significance that these three rights to relief were coexisting and that they arose out of a single transaction.

(a) As a matter of fact, if these demands of appellant had arisen below by way of counterclaim and not complaint, joinder would have been compulsory.

"A pleading shall state as a counterclaim any claim which at a time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence and is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action." (Rule 13 (a), F.R.C.P.)

It is noteworthy that the language of Rule 13 (a) is in terms of "claims" and not in terms of causes of action.

2. Affirming the judgment below, will in no way injure appellant. A-13,001 remains pending, and appellant may there have determined in full its rights under the contract of May 18, 1955 that

it made with appellee. No doubt appellant will contest this statement on the grounds that, while A-13,001, will determine the amount of money due appellant from appellee, nevertheless, this contract of May 18, 1955, is a burden on appellant; and appellant is entitled to a decision as to whether or not the contract can be avoided. In the first place, such a contention is immaterial. If the contract is valid and binding, it makes no difference whether or not appellant considers it a desirable contract. Although the question of avoidance is not before this court, appellee submits that this record reflects on its face the fact that appellant, obviously, cannot successfully maintain a suit to avoid the contract of May 18, 1955, in view of the fact that it has, for several years, accepted the monetary benefits of the contract. Further, the contract was drawn by appellant and is to be construed, therefore, against appellant. Appellant would be estopped.

The granting of a declaratory judgment is discretionary and should be refused if there is nothing to be gained by it (*Maryland Casualty Co. v. Consumers Finance Service of Pa.*, 101 Fed. 2d 514; *Libberman v. Merkin,* 2 F.R.D. 315). Appellee will dwell in detail, subsequently in this brief, on the contention that the reformation relief sought in A-13,503 is identical to the relief of enforcing the contract in A-13,001; except that it appears appellant intends to obtain it by initiating still another law suit (p. 9 ante).

If, therefore, appellant cannot avoid its contract, to permit an action for a declaratory judgment would be futile; and, if appellant can obtain all the relief in A-13,001 that it seeks by reformation in A-13,503, the determination of this appeal against appellant can in no way work a detriment to appellant.

DOES THE PENDENCY OF A-13,001 BAR APPELLANT FROM THE REFORMATION RELIEF SOUGHT IN A-13,503?

Although it is, admittedly, at the discretion of the court, where two identical actions are pending, whether or not one will be dismissed or merely stayed while the other is completed, appellant submits that the better policy, where there are identical parties, subject matter and relief sought, is to dismiss the subsequent action. As will be spelled out herein, the reformation sought in A-13,503, is identical to the relief sought in A-13,001. The parties and the subject matter are the same. A-13,001 is pending. A-13,503 has been dismissed; therefore, at least with respect to reformation, this court should affirm the judgment below in A-13,503 (1 *C.J.S.* 61, Abatement and Revival, Secs. 36 and 37; 1 *C.J.S.* 119, Abatement and Revival, Sec. 81; *Wheelis v. Wheelis,* 226 S.W. 2d 224; *Sears, Roebuck and Company v. Metropolitan Engravers,* 245 Fed. 2d 67).

IS APPELLANT ESTOPPED FROM MAINTAINING A-13,503?

The doctrine of election of remedies will be discussed subsequently. Some courts will not recognize this doctrine but, instead, rely upon the doctrine of

estoppel. The majority of courts distinguish between the two doctrines. When considering the doctrine of estoppel, the courts require a showing that failure to require a party to abide by the remedy elected will cause a real injury to the other party (28 *C.J.S.* 1059).

Appellee submits that it should prevail on this appeal under either the doctrine of election of remedies or that of estoppel.

In connection with estoppel, the primary point is that appellee had a right to rely upon the stipulation entered into by appellant and appellee to the effect "that . . . the sole question to be determined herein is whether or not the word 'property' as used in said contract means real property or whether it means real and personal property" (TR 13; paragraph VI of Stipulation). In the light of this stipulation, appellee had a right to believe that the judgment in the Justice Court would conclude this matter. It was appellant that chose the Justice Court. Certainly, appellee had the right to believe and reasonably rely upon the matter not proceeding beyond an appeal from the Justice Court to the District Court, the now pending action of A-13,001.

Instead of abiding by its stipulation, and by way of further injury to appellee, appellant submits appellee to the continued annoyance and expense of continuous and even duplicitous legal proceedings: first, in opposing the amendment to the complaint in A-13,001 (unjustifiable in the light of the above quoted stipulation and in the further light of the fact that ap-

pellant must be presumed to know the law) (Sec. 68-9-14, *A.C.L.A.* 1949; TR 6-7) and therefore knew it had no chance of success in seeking the amendment; and, second, the annoyance, expense and inconvenience throughout all the proceedings in A-13,503, including this appeal.

The above stated applies to both the remedies of reformation and declaratory judgment.

HAS APPELLANT WAIVED ITS RIGHT TO MAINTAIN A-13,503?

Appellee submits that the stipulation just quoted in connection with estoppel (TR 13) is an excellent basis for a decision that appellant has waived its right to maintain A-13,503.

> "Section 68-2-1. Actions within Jurisdictions: Judgments on Confession.
>
> A justice's court has jurisdiction, but not *exclusive,* of the following actions:
>
> First. For the recovery of money or damages only when the amount claimed does not exceed $1000.00; . . ." (Emphasis ours.)
>
> Sec. 68-2-1, *A.C.L.A.* 1949.

> "Where a counterclaim exceeding the jurisdictional limit is pleaded, the jurisdiction of the justice's court is not ousted, but the prevailing defendant cannot, besides defeating plaintiff's claim, be awarded more than jurisdictional amounts; he waives any balance."
>
> Notes of Decisions 3 *A.C.L.A.* 2454;
>
> *Bennett v. Forrest,* 69 F. 421, 1 Alaska Rep. 721-722.

By a like token, where appellant had available to it, equitable and statutory remedies (reformation and declaratory judgment) over which only the District Court had jurisdiction, and particularly when these remedies arose out of the same transaction and existed concurrently with the remedy of enforcing the contract, by initiating action in a Justice Court for less than appellant claimed to be entitled, it waived the overage.

ARE THERE MULTIPLE CAUSES OF ACTION HERE OR BUT A SINGLE CAUSE OF ACTION AND MULTIPLE REMEDIES?

There seems to be some confusion as to whether or not the differences between appellant and appellee are concerned with multiple causes of action or merely multiple remedies (Appellant's Brief p. 12).

It may be contended that there are two causes of action, one to enforce the contract, which embodies not only the remedy of reformation, but the remedy of enforcement, and a second cause of action for a declaratory judgment; however, appellee believes that the law establishes that the procedure for a declaratory judgment is not a cause of action but merely a procedural remedy. Indeed, the cases hold that a proceeding for a declaratory judgment will lie irrespective of the existence of a cause of action (*Maryland Casualty Company v. Hubbard,* 22 Fed. Sup. 697).

The present declaratory judgment statute, (28 U.S.C.A. Sec. 2201) is a descendant from the old Section 400 of the same Title which reads:

> "In cases of actual controversy, except with respect to federal taxes, the courts of the United

States shall have power upon petition, declaration, complaint or other appropriate pleadings to declare rights and other legal remedies of any interested party petitioning for such declaration, whether or not such further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such." (48 Stat. 955; 49 Stat. 1027.)

The present Federal Declaratory Judgment Statute (28 U.S.C.A. Sec. 2201) is, and since the passing of the old Sec. 400, has been held to be, a procedural statute which provides an additional remedy for use in those controversies over which District Courts already have jurisdiction (*American Chemical Paint Co. v. Dow Chemical Co.,* 161 Fed. 2d 956, rehearing denied, 164 Fed. 2d 208; *Caven v. Clark,* 78 Fed. Sup. 295; *Sachs v. Cluett, Peabody & Company,* 91 Fed. Sup. 37; *Berlitz School of Languages of America v. Donnelley and Suess,* 84 Fed. Sup. 75; *Donnelley v. Mavar Shrimp and Oyster Co.,* 190 Fed. 2d 409 at 410).

The act is to determine rights prior to the filing of a regular action and to prevent multiplicity of litigation (*Security Insurance Co. v. Jay,* 109 Fed. Sup. 87; *Scott-Burr Stores Corp. v. Wilcox,* 194 Fed. 2d 989).

The declaratory judgment statute merely enlarges the range of remedies (*Pa. Railway Co. v. U.S.,* 111 Fed. Sup. 80).

Speaking of the various declaratory judgment acts, it is said:

". . . that the effect is simply to make a controversy over a legal or equitable right or title jus-

ticiable at an earlier state of the controversy than that which gave rise to a cause of action at common law, or to enable the normal defendant to institute the proceedings.

In general, it may be said that declaratory judgment acts are designed to supply former deficiencies in legal procedure and to furnish a full and adequate remedy where none existed before, rather than to supplant or displace pre-existing and effective remedies or to provide a substitute for other regular actions. . . ."

16 *Am. Jur.* 281, Declaratory Judgments, Sec. 7.

"Jurisdiction under a declaratory judgment act is not confined to cases in which the parties or one of them have a cause of action apart from that conferred from the act itself. . . . To hold that there must be a 'cause of action' as that term is ordinarily used would defeat the fundamental purpose and destroy the real value of the *remedy.*" (Emphasis ours.)

16 *Am. Jur.* 286, Declaratory Judgments, Sec. 12.

From the date of the initial enactment of the Federal Declaratory Judgment Statute (Old Sec. 400, *supra*) to the present Section 2201, the cases have uniformly held that a declaratory judgment is procedural and remedial and, hence, not a cause of action at all. (*Reliance Life Ins. Co. v. Burgess,* 112 Fed. 2d 234; *Love v. U.S.,* 108 Fed. 2d 43; *Ohio Casualty Ins. Co. v. Marr,* 98 Fed. 2d 973; *Ohio Casualty Ins. Co. v. Richards,* 27 Fed. Sup. 18; *Sinclair Refining v. Burroughs,* 133 Fed. 2d 536).

Some of the cases contain even stronger language to the effect that a declaratory judgment has nothing to do with the creation of a right, a thing to be protected by a cause of action and continue that the declaratory judgment merely establishes a new remedy for existing rights (*Aralac, Inc. v. Hat Corp. of America,* 166 Fed. 2d 286; *American Chemical Paint Co. v. Dow Chemical Co., supra; Davis v. American Foundry Equipment Co.,* 94 Fed. 2d 441; *American Casualty Co. of Reading, Pa. v. Howard,* 80 Fed. Sup. 983; *Sunshine Mining Co. v. Carver,* 34 Fed. Sup. 274).

DOES THE DOCTRINE OF ELECTION OF REMEDIES BAR APPELLANT FROM MAINTAINING A-13,503?

The doctrine of election of remedies is a rule of policy designed to prevent vexatious litigation (28 *C.J.S.* 1058, Election of Remedies, Sec. 1).

The basis of the rule is that one shall not be vexed twice for one and the same cause (28 *C.J.S.* 1060).

Stated differently, the rule is based upon prohibiting one from occupying inconsistent positions; in other words, one shall not be allowed to both approbate and reprobate (28 *C.J.S.* 1058).

The doctrine is recognized by both state and federal courts (28 *C.J.S.* 1058, *supra; U.S. v. Oregon Lumber Co.,* 260 U.S. 290; *Durham v. New Amsterdam Casualty Co.,* 208 Fed. 2d 342; *U.S. v. Bernstein,* 149 Fed. Sup. 568; *First Nat'l Bank in Wichita v. Luther, supra; Sears, Roebuck and Co. v. Metropolitan Engravers, supra*).

"All actions which proceed on the theory that plaintiff has ratified an authorized transaction are inconsistent with actions which proceed on the theory that plaintiff has repudiated such transaction."

28 *C.J.S.* 1076, Election of Remedies, Sec. 9.

See also:

Minneapolis Nat'l Bank of Minneapolis, Kansas v. Liberty Nat'l Bank of Kansas City, 72 Fed. 2d 434;

Butler Bros. v. Hames, 97 S.W. 2d 622.

Rescission and reformation are inconsistent (*Feit v. Reichert,* 189 Pac. 854); hence, the relief of declaratory judgment asking that appellant be allowed to avoid the contract or to have the contract declared void is inconsistent with A-13,001 to collect money allegedly due under the contract, that is, to enforce the contract of May 18, 1955.

In *U.S. v. Oregon Lumber Co., supra,* the court was concerned with an action brought by an appellant against appellee seeking damages for the fraudulent acquisition of land by patent from the government. The appeal to the Supreme Court was from the Ninth Circuit. Previously, appellant had lost the suit against the appellee which sought to set aside the patent and establish ownership of the land in appellant, the United States. The prior suit was lost by the United States as a result of a plea in bar of the statute of limitations. The court held for appellee and based its decision on the doctrine of election of remedies (*U.S. v. Oregon Lumber Co.,* 260 U.S. 290).

"Upon the facts stated the sale was voidable (Moran v. Horsky, 178 U.S. 205, 212), and the plaintiff in error was entitled to disaffirm the same and recover the land or affirm it and recover damages for the fraud. It could not do both. Both remedies were appropriate to the facts, but they were inconsistent since the first was founded upon a disaffirmance and the second upon an affirmance of a voidable transaction. Robb v. Vos, 155 U.S. 13, 43; Connihan v. Thompson, 111 Mass. 270, 272. 2 Black on Recision and Cancellation, Sec. 562, and cases cited. The rule is applicable to the government in cases where patents have been procured by fraud. U.S. v. Koleno, 366 Fed. 180, 183. Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocable of such determinative acts is the bringing of a suit based on one or the other of these inconsistent conclusions. Robb v. Vos, supra."

U.S. v. Oregon Lumber Co., supra, at 294-295.

"But here in the equity suit, the plaintiff in error upon the coming in of defendant's plea of the statute of limitations made no offer to amend or request to transfer the case to the law docket, but proceeded to trial and judgment upon the original bill, with knowledge of all of the facts for more than six years prior to the filing of its bill. Defeated in its equity suit, it brought its action at law upon the same allegations of fact. We think it is not admissible to thus speculate upon the action of the court, and having met with an adverse

decision, to again vex the defendant with another inconsistent action upon the same facts."

U.S. v. Oregon Lumber Co., supra, at 296.

"The case of Bistline v. U.S., 299 Fed. 546, relied upon by the plaintiff in error, is not in conflict with this conclusion. That was an action by the government to recover damages for the fraudulent acquisition of certain public lands. A prior suit had been brought in equity to cancel the patent, but the defendant's answer showed that the land had been conveyed to persons not made parties to the suit. The government therefore promptly dismissed its suit in equity and, on the same day, commenced the action at law for damages. If, in the instant case, a like course had been followed upon the coming in of defendant's answer pleading the statute of limitations, the case just referred to would have been in point."

U.S. v. Oregon Lumber Co., supra, at 297.

"The distinguishing feature of the instant case is that after the coming in of the answer, pleading the statute of limitations, and the plain warning thus conveyed of the danger of continuing the equity suit further, the plaintiff in error persisted in pursuing it to final judgment, instead of promptly reforming the cause or dismissing the bill and seeking the alternative remedy not subject to the same defense. The doctrine of election of remedies and that of res judicata are not the same, but they have this in common, that each has for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause. The policy embodied in this

> maxim we think requires us to hold that the plaintiff in error, in bringing the original suit, and in continuing after the plea in bar to follow it to a final determination, made an irrevocable election, and that it is now estopped from maintaining the present inconsistent action."
>
> *U.S. v. Oregon Lumber Co., supra,* at 301.

Proceeding under the belief that a declaratory judgment is merely an additional remedy, appellee submits that the doctrine of election of remedies is applicable to this appeal and that, therefore, an action for declaratory judgment to the effect that a contract is void, being inconsistent with a pending action to enforce the contract (A-13,001) is barred by virtue of the doctrine.

One cannot both affirm and disaffirm (12 *Sixth Decennial Digest* 872 *et seq.,* Election of Remedies Key No. 3 (2)).

As previously stated a man shall not be allowed to approbate and reprobate.

Appellee submits that there can be no question but that the remedy of declaratory judgment seeking to disaffirm the contract, being inconsistent with the remedy to enforce the contract (A-13,001 pending in the District Court and 10-297-C having been decided in the Justice's Court) is barred by the doctrine of election of remedies (see also 28 *C.J.S.* 1063, Election of Remedies, Sec. 3a).

There is more doubt as to whether or not the doctrine of election of remedies will bar the relief of

reformation; however, appellee submits that the question has already been decided favorably to appellee so far as this court is concerned.

The cases which hold that an action to enforce the contract is no bar to a subsequent action to reform it base their reasoning on the ground that there is nothing inconsistent in the remedies seeking enforcement and the remedies seeking to reform in that they both seek to affirm the contract. This reasoning evades the issue, and the conclusion of these cases is possible only because the courts have the word "affirm" as the focal point of their reasoning.

The more logical approach is that nothing could be more inconsistent than attempting to enforce something "as is" (A-13,001 and 10-297-C) and attempting to enforce something "as it is not" (reformation in A-13,503).

In any event, appellee contends that the cases holding that there is no inconsistency in suing to enforce a contract and subsequently suing to reform it are not in point. Appellant seeks to enforce the contract in A-13,001 and sought to enforce it in 10-297-C. In the matter on appeal (A-13,503) appellant seeks to reform the contract; *but appellant does not seek to enforce the contract as reformed* (TR 31; Appellant's Brief, p. 13). The cases holding no inconsistency are concerned with an action to not only reform but to enforce it as reformed.

> "According to some decisions, where a mistake has been made in a contract, of such a nature and

> under such circumstances as to give rise to the equitable right to have the contract reformed, the prosecution to judgment of an action at law for damages for breach of the contract is inconsistent with and a bar to, a subsequent suit for the reformation of the contract. Likewise, a pending suit on a contract as written precludes a party from subsequently seeking reformation thereof."
>
> 28 *C.J.S.* 1073, Election of Remedies, Sec. 7.

Einsiedler v. Massari supports this doctrine. Massari sued Einsiedler for the balance due on a contract. Einsiedler defended by affirmatively pleading a loan agreement and a security trust agreement, the operation of which was to pay the balance on the contract on which Massari based his claim. Massari won. Einsiedler brings the present action by way of reformation of the contract on which Massari recovered in order to incorporate into that contract the loan agreement and the security trust agreement previously pleaded by Einsiedler. The court refused and denied the action of reformation. The case is an excellent one in discussing the policy involved. (*Einsiedler v. Massari,* 78 Atl. 2d 572).

It is true that the court in the *Massari* case said that it bases its decision on *res judicata;* however, as a matter of fact, *res judicata* cannot apply except upon the principle that a matter is *res judicata* as to not only what was decided but as to all that could have been decided between the parties. The policy on which the court based its decision is applicable to the present case now on appeal before this court; and that

policy is to the effect that, there being liberal rules of joinder in pleading and the abolition of the distinction between courts of law and courts of equity, Einsiedler had an opportunity not only to plead the loan agreement and security trust agreement by way of an affirmative defense in the original suit brought by Massari, but, at that time, he had an opportunity to seek the reformation he now seeks in the subsequent action.

As previously pointed out, the *Massari* case supports the contention that appellant's conduct is particularly unjustifiable in light of the fact that, at the time appellant instigated action in the Justice's Court, it had a choice of forums between the Justice Court and the District Court; and there were coexisting at that time, the remedies to enforce the contract, to reform the contract and enforce it as reformed, and for a declaratory judgment. Instead of seeking these three claims for relief in the District Court at that time, appellant chose to prosecute this suit in a piecemeal fashion and even now threatens to throw other pieces at appellee in the future, since appellant still does not ask for enforcement of the contract as reformed (TR 31).

One who elects to sue upon a written contract as executed and who prosecutes the action to trial and judgment cannot thereafter bring an action to reform the contract (*Hennepin Paper Co. v. Fort Wayne Corrugated Paper Co.,* 153 Fed. 2d 822).

The *Hennepin* case involves a plaintiff who sued on a contract, as orally modified, which provided that de-

fendant was to purchase from plaintiff specified amounts of paper. Plaintiff lost. Plaintiff then brought the present action wherein "the plaintiff is seeking a reformation of the written contract under date of July 1, 1941, so as to make that contract conform to the 'true intent and understanding of both parties' to the contract. . . ." (*Hennepin* case, *supra* at 824). This case is directly in point, although the factual situation in the matter on appeal before this court is such as to spell out an even stronger case for this appellee than the defendant had in the *Hennepin* case. (As will be pointed out in a subsequent section as to what constitutes a conclusive election under the doctrine of election of remedies, appellant has not only elected the remedy but tenaciously refuses to relinquish it.)

> "*Under the Federal Rules of Civil Procedure,* and under the law of Indiana, the plaintiff had the right, in the first action, to, by proper pleading, ask that the written contract of July 1, 1941, be reformed and redrawn, as it is attempting to do in the second action." (Emphasis ours.)
>
> *Hennepin* case, supra, at 825.

By like token, this appellant had all three remedies available to it and the forum of the District Court open to it at the time it initiated the action to enforce the contract in the Justice Court, which action is now pending in the District Court at Anchorage as A-13,001.

> "It certainly knew the same facts at the time the district court struck out paragraph V of the complaint in the first cause of action, as it knew at the

> time it drafted the complaint in the second action, and it should have filed either an amended complaint or an additional count or paragraph in that action so as to have presented all issues in the same action."
>
> *Hennepin* case, *supra,* at 825.

By like token, when this appellant filed in the Justice Court, all facts concerned with the alleged right to all three remedies were known to this appellant. The appellant sued to enforce the contract, so its claim to recover money under the contract, obviously, was in the mind of appellant. It knew that there was a question of reformation, because it stipulated that the sole question to be decided in the Justice Court was the meaning of the word "property". Further, it even had its city manager and clerk testify as to the intent of the parties, testimony relevant to nothing more than reformation. Certainly the existence of the Federal Declaratory Judgment Statute was a matter known to the city attorney at the same time. It was only after the appellant lost this action in the Justice Court that it became revengeful and attempted to avoid the contract by seeking amendment in A-13,001 and later initiating A-13,503. By proceeding in the Justice Court, initially, when it knew the Justice Court had no jurisdiction over reformation or declaratory judgment, it is obvious that the only thing appellant sought was money; but, being denied the money, it has undertaken to penalize appellee as much as it possibly can, threatening avoidance and the cutting off of the sewer service and continual, vexatious litigation.

"This it could have done 'regardless of consistency and whether based on legal or equitable grounds or both.' Rule 8 (e) (2) Federal Rules of Civil Procedure. The authority to thus have joined its claims is specifically provided for in Rule 18, of the Federal Rules of Civil Procedure as follows: '(a) Joinder of Claims. The plaintiff in his complaint * * * may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.' See also, Burns' Indiana Statutes, Annotated, 1933, Sec. 2-101, which reads as follows: 'One form of action.—There shall be no distinction in pleading and practice between actions at law and suits in equity; and there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. All courts which are vested with jurisdiction both in law and equity may, to the full extent of their respective jurisdictions, administer legal and equitable remedies, in favor of either party, in one and the same suit, so that the legal and equitable rights of the parties may be enforced and protected in one (1) action.' . . .

"Therefore, it seems clear that the plaintiff predicated his first suit on the written contract plus the alleged subsequent oral modification of one of its terms. . . . It made its election in the first action and it cannot now, in a separate action, assume an entirely different and inconsistent position in an effort to have the same written contract reformed. As heretofore observed, such effort, if it desired a reformation of contract, should have been undertaken in the first action. . . .

"The Supreme Court of Indiana in the case of Royal Ins. Co. v. Stewart, 190 Ind. 444; 129 NE 853, 857, said 'Where a party elects to sue on a written contract as executed, and the action proceeds to trial and judgment, he cannot thereafter bring an action to reform the contract. 2 Black on Judgments, Sec. 632 * * *. Again, in the case of Knight v. Electric Household Utilities Corp., 133 N.J. Eq. 87, 30 Atl. 2d 585, 588, affirmed 134 N.J. Eq. 542, 36 Atl. 2d 201, the Court said, 'Whether a plaintiff is precluded by the judgment, depends upon the extent to which the legal and equitable remedies have been merged in the state where the judgment is rendered. Restatement—Judgments, Sec. 66. The judgment barred the suit for reformation if the plaintiff could have obtained reformation in his original action on the contract. Royal Ins. Co. v. Stewart, Inc. 190 Ind. 444, 129 N.E. 853. But where the law court cannot give equitable relief, the judgment is not a bar. Northern Assurance Co. v. Grand View Bldg. Assoc., 203 U.S. 106, 27 Sup. Ct. 27, 51 L. Ed. 109. . . .'

"Not only under the Federal Rules of Civil Procedure, but under the law of Indiana, the plaintiff could have, in the first action, sought a reformation of the contract, and *it was its duty* to have done so if it desired to litigate that question. Not having done so, and having sought an entirely different and inconsistent remedy in that action, it cannot now maintain the second action. The district court properly granted the motion of defendant for a summary judgment.

"The judgment of the district court is affirmed." (Emphasis ours.)

Hennepin case, *supra* at 825-827.

What better authority for the application of the doctrine of election of remedies or of estoppel or of an outright waiver, irrespective of appellee's right to rely upon the stipulation of appellant to the effect that the sole question is the definition of the word "property", could one have than the foregoing authority? (Supporting the *Hennepin* case, see: 49 *A.L.R.* 1513 at 1515-1517; *Leaksville Light & Power Co. v. Ga. Casualty Co.,* 137 S.E. 817.)

WHAT ACTS CONSTITUTE A CONCLUSIVE ELECTION UNDER THE DOCTRINE OF ELECTION OF REMEDIES?

As to what constitutes an act sufficiently decisive to prompt a court to hold, with respect to the doctrine of election of remedies, that an election has, in fact, been made, there is a wide divergence of authority.

> "The authorities are by no means harmonious as to what acts constitute a conclusive election. . . . it may be stated as a general rule that any decisive act of a party, with the knowledge of his rights and of the facts, indicating an intent to pursue one remedy rather than the other, determines his election in case of conflicting and inconsistent remedies. . . .
>
> "Any unambiguous act consistent with one remedy and inconsistent with others will generally be deemed conclusive evidence of an election. . . .
>
> "According to some decisions, an election has matured only when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other. According to other authority, a deliberate choice or election is

binding even though no positive disadvantage or injury has resulted to the other party, and, as appears infra Sec. 15, the mere commencement of an action may be sufficient to preclude the subsequent pursuit of another remedy."

28 *C.J.S.* 1077 to 1079, Election of Remedies, Sec. 11.

Some cases hold that a party is not bound by his election unless he obtains some advantage by his first action, such as judgment in his favor (*Morlan v. Lucey Mfg. Corp.,* 7 Fed. 2d 494, affirmed 14 Fed. 2d 920, certiorari denied 273 U.S. 744, 47 S.Ct. 344, 71 L.Ed. 870).

As noted in the above citation, the Supreme Court of the United States denied certiorari; however, when the matter was actually considered by the Supreme Court, it had this to say:

" ;... and to hold that plaintiff may then invoke another and inconsistent remedy is not to recognize an exception to the general operation of the doctrine of election of remedies but to deny the doctrine altogether. Here, upon the facts as stated in the bill in equity and later in the action at law, both remedies were available to the plaintiff in error. In electing to sue in equity plaintiff in error proceeded with full knowledge of the facts, but it underestimated the strength of its cause, and if that were sufficient to warrant the bringing of a second and inconsistent action the result would be to confine the defense of an election of remedies to cases where the first suit had been won by plaintiff and to deny it in all cases where plaintiff had lost. But the election was

determined by the bringing and maintenance of the suit, not by the final disposition of the case by the court. See, for example, Bolton Mines Co. v. Stokes, 82 Md. 50, 59."

U. S. v. Oregon Lumber Co., supra, at 301.

The *Oregon Lumber* case is still good law.

There is an extensive annotation on this subject of what constitutes a conclusive election in 6 *A.L.R.* 2d 10.

Irrespective of the divergence of authority, there seems to be no doubt that the prosecution of one remedial right to judgment or decree, whether the judgment or decree is for or against the plaintiff, is a decisive act which constitutes a conclusive election, and that is exactly what appellant, as plaintiff, did in 10-297-C (28 *C.J.S.* 1087, Election of Remedies, Sec. 14).

". . . it is uniformly held that prosecution of a remedy to a judgment on the merits is a conclusive choice precluding the plaintiff from thereafter maintaining an inconsistent remedy, and this rule has been held applicable even though the judgment was against the plaintiff . . ."

6 *A.L.R.* 2d 11.

The Federal courts have extended the doctrine well beyond the requirement of pursuing a remedy to judgment.

Some even prohibit the amendment of a complaint in such a way as to set forth, by amendment, a remedy inconsistent with that sought in the original com-

plaint (*U.S. v. Bernstein, supra; Warner v. Godfrey,* 186 U.S. 365).

In *Durham v. New Amsterdam Casualty Co.,* it was held that the obtaining of a motion to set aside a judgment on grounds that the judgment was obtained by fraud, *without any further proceedings* in that action whatsoever, constituted a bar to a proceeding in a separate action where damages for the fraud were sought. The court held that the obtaining of the order, setting aside the judgment as having been obtained by fraud, constituted an election to ignore the fraud and proceed on the merits; and that, therefore, the right to damages by fraud was lost (*Durham v. New Amsterdam Cas. Co., supra*).

To appellee's thoughts, the most reasonable and logical position is that stated in the *Oregon Lumber Co.* case, namely:

> ". . . *Any decisive action by a party,* with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocable of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions. Robb v. Vos, supra." (Emphasis ours.)
>
> *U. S. v. Oregon Lumber Co., supra,* at 295.

Appellee does not see how anyone could act more decisively toward electing a remedy than appellant has acted. Appellant has proceeded even beyond the obtaining of a judgment in the Justice Court. It has appealed that judgment to the District Court, and

that action is still pending. As a matter of fact, the reformation relief that appellant seeks is, in fact, no more than an added attempt to get a favorable judgment in A-13,001. The reformation sought is to spell out the word "Property" as meaning real and personal property. This is the sole issue in A-13,001 and the identical issue decided over a year ago January 2, 1957, (TR 18) by the Justice Court in 10-297-C. As stated, presumably, if appellant were successful in obtaining the reformation, appellant would then harass appellee even further by suing on the contract as reformed; otherwise, why reform it?

The issues in the Justice Court resolved themselves into this. If the Justice Court held for appellant and awarded it a monetary judgment, such could have been done only by deciding that "property" meant real and personal property. If the Justice Court held as it did, for appellee, such could be done only by holding that the word "property" meant real property alone. Since the matter is now appealed to the District Court as A-13,001, the District Court is now asked to interpret the meaning of the word property all over again. Appellant is seeking a further determination of the meaning of the word property in asking for reformation in A-13,001. In other words, appellant absolutely refuses to do anything other than attempt to enforce the contract *as interpreted by appellant.* Appellee cannot conceive of evidence more conclusive of an absolute election (see annotation in 6 *A.L.R.* 2d, particularly at pages 17, 18, 19, 25, 26, 27, 28, 29, 30 and 49).

DO THE FEDERAL RULES OF CIVIL PROCEDURE BAR APPELLANT FROM MAINTAINING A-13,503?

If we are concerned here with but a single cause of action and three remedies, as appellee believes the facts to be, there is no question of joinder of causes of action, and it is to causes of action that Rule 18 of the Federal Rules of Civil Procedure is primarily directed although that rule speaks in terms of "claims" and not causes of action.

Appellee submits that it goes without saying that (1) seeking monies under a contract and (2) seeking reformation of a contract together with monies under it as reformed are but two remedies arising out of a single cause of action. Although appellant believes not, it is conceivable that a declaratory judgment could be held to be a separate cause of action and not merely a remedy arising out of the same cause of action.

Proceeding on the assumption, which appellee believes to be fallacious, that multiple causes of action are involved, one finds cases to the effect that the joinder mentioned in Rule 18 is permissive but not mandatory.

Although a single cause of action may not be split, failure to join several separate causes of action in a single proceeding, although they *could* all be litigated in the same action, is no bar to subsequent suit on the omitted causes of action (*Velsicol Corp. v. Hyman,* 103 F. Sup. 363; *Leimer v. Woods,* 196 Fed. 2d 828).

Appellee submits that neither of the two last cited cases are in point.

The *Leimer* case is a case under the old Rent Control Act where the government sought to restrain a defendant from overcharging his tenants, asked damages in the nature of rebating the amount of the overcharge, and further asked treble damages as punishment in accordance with the provisions of the act. The defendant asked for a jury trial on the question of damages. The lower court proceeded in equity on the subject of restraint, found such proper, and then held that the equity hearing on restraint settled the damage question too under the doctrine of *res judicata.*

The Appellate Court reversed and stated that the joinder permitted by Rule 18 was not such as to allow a denial of a substantive right, such as a trial by jury on the issue of damages. The court held that such was particularly true in the light of Rule 38 of the Federal Rules of Civil Procedure, permitting separate trials of causes of action joined together. The court said there would have to be a very strong ground indeed to justify a court in proceeding first in equity and denying a right to trial by jury on the question of damages instead of separating the actions, hearing the damage question before a jury and then, if appropriate, proceeding to the equitable matter of restraint.

The case does not really deal with whether or not there was a proper joinder (although it is implied that the joinder is proper) or whether or not a joinder is mandatory or permissive (on which nothing is said). The holding of the case is that a substantive right

cannot be denied a defendant by the application of Rule 18.

The *Velsicol* case deals with a defendant who made a number of discoveries while an employee of plaintiff, and, in violation of his contract of employment, refused to assign to plaintiff the patent applications for these discoveries. The court held that the plaintiff had no obligation to join all of these causes of action in a single suit against the defendant.

The *Velsicol* case deals with causes of action that arose at different times. One cause of action would mature, and the defendant would then enter into another series of acts which would result in another cause of action maturing and so on. This is to be distinguished from the case at bar where all relief sought was available to appellant at the time litigation was initiated in 10-297-C.

Whatever causes of action exist in the present controversy between appellant and appellee, they existed concurrently and arose out of the same transaction. They not only existed concurrently, but they arose concurrently. There was no "actual controversy" within the meaning of the Declaratory Judgment Statute, nor was there any question of reformation until the appellant brought its action in the Justice Court. The matters arose simultaneously.

In the light of a factual situation such as the one at bar, the simultaneous assertion of all forms of relief claimed to be due appellant, and the simultaneous assertion of all causes of action claimed by appellant

(if multiple causes of action there be) should be mandatory. At least such is the view of the *Hennepin* case, *supra;* and any policy to the contrary flagrantly violates the established, basic policy of such of the Federal Rules of Civil Procedure as are concerned with settling all issues present in a particular matter at one time.

As previously stated, if the claims of appellant arose by way of counterclaim and not complaint, joinder would be compulsory under pain of waiver (Rule 13 (a) *F.R.C.P.*).

Speaking of Rule 18, Barron and Holtzoff say:

> ". . . Thus where the parties are the same, there is no restriction whatsoever. . . . Consequently there is no excuse for the piecemeal litigation of a claim and all grounds on which a claim for relief is based must be asserted and concluded in one action. . . ."
>
> 2 *Barron & Holtzoff's Federal Practice Procedure* 41-42.

> "As to the joinder of causes of actions, the new rules introduce what might be said to be novel principle. They proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleading, but only from trying two or more matters together which have little or nothing in common. They therefore permit the joinder of practically anything, and the court is allowed in its discretion to make an order for the separate trial of any matters which can be more conveniently tried that way. This, of course, eliminates a great deal of dis-

cussion and argument over technical points respecting joinder.

"Where the parties are the same, there is no restriction whatsoever. . . ."

45 W.Va. L.Q. 5;

Commentary following Rule 18 at Title 28 *U.S.C.A.* p. 29.

Where the claims are against the same defendant, misjoinder is impossible in a civil action (*Atl. Lumber Corp. v. So. Pac. Co.,* 2 F.R.D. 313 at 314).

Federal Rule of Civil Procedure 18 seeks to avoid multiple litigation (*Rank v. Krug,* 142 F. Sup. 1). The reason for the rule is obvious. It seeks to wipe the slate clean between a single plaintiff and a single defendant as expediently as possible. It seeks to avoid the continuous vexation in court of one defendant by one plaintiff.

The case of *White v. Sinclair Prairie Oil Co.,* 139 Fed. 2d 103, was an action brought by one Mary to obtain royalties. Mary had previously lost title to the land on a mortgage foreclosure; and it subsequently passed to the lessors, the present owners, who leased the land to the oil company. The oil company made a contract with Mary whereby it gave her $8,000, in return for which Mary ratified the lease held by the lessee oil company and agreed to consider this lease valid irrespective of the actual title to the land (Mary being in a dispute with the lessor as to the title to the land). The agreement further provided that Mary waived all of her claims against the oil

company except as to royalties to be paid. Mary brought a suit against the lessor seeking possession and title to the land and lost. Subsequently, suit was brought by the United States on behalf of Mary, an Indian, against the lessor and the lessee oil company in which title to the land was sought together with royalties to Mary on the grounds that she was the true owner of the land. Again Mary lost. The present case involved a suit by Mary against the lessee oil company for royalties based on the $8,000 agreement, Mary contending that the agreement obligated the oil company to pay her royalties over and above what the oil company might have to pay the lessor owner.

Again Mary lost.

The court held that Mary's right to royalties was decided in the suit brought on her behalf in which both title and royalties were sought and that, thereafter, Mary could not base the same claim on some basis other than ownership, such as the $8,000 agreement with the oil company. The ruling of the court was to the effect that the suit brought on Mary's behalf for title and royalties was *res judicata* as to her royalty rights, by virtue of title, the $8,000 agreement or otherwise.

The court condemned Mary's course of litigation as "piecemeal litigation".

Certainly, the course of litigation followed by appellant, namely: Into the Justice Court and out of it to the District Court in A-13,001; attempting expansion by amendment in A-13,001; out of the District Court on the question of amendment and into the same court

seeking the same expansion in A-13,503; and appeal to this court; and the apparent intention to bring still another suit to enforce the contract "as reformed" in the event reformation is granted; is a classic example of the "piecemeal litigation" which the Federal Rules, Barron & Holtzoff, the *White* case, and innumerable cases concerned with *res judicata,* the avoidance of circuitous litigation, and the condemnation of multiplicity of suits seek to avoid.

Where, under the liberal provisions of the Federal Rules of Civil Procedure, appellant could have sought all relief claimed at one time and did not, this court should limit appellant to the proceeding in A-13,001, bar appellant from further vexing appellee, adopt the logic and good policy of the *Hennepin* case, and affirm the judgment appealed.

IS APPELLANT BARRED FROM MAINTAINING A-13,503 BY VIRTUE OF THE DOCTRINE OF RES JUDICATA?

The reasoning of the *Hennepin* case leads us logically to consideration of the doctrine of *res judicata.*

The *Hennepin* case holds, and such is logical and reasonable and wholly in keeping with the general policy of the Federal Rules of Civil Procedure, that:

> "Not only under the Federal Rules of Civil Procedure, but under the law of Indiana, the plaintiff could have, in the first action, sought a reformation of the contract, *and it was its duty to have done so if* it desired to litigate that question. . . ." (Emphasis ours.)
>
> 153 Fed. 2d at 827.

The law is established that the doctrine of *res judicata* operates as a bar not only as to what was litigated but as to what could have been litigated (innumerable cases in Volume 18-6 *Decennial Digest,* 1207, *et seq.,* Key No.: Judgments 713 (2); *First Nat'l Bank in Wichita v. Luther, supra* at 265).

In view of the liberal provision of the Federal Rules of Civil Procedure and in furtherance of the policy against continuous vexing through litigation, appellee submits that the principle of *res judicata* should not be limited to matters that can be raised only in the particular court in which the initial remedy is sought, in this case the Justice Court; but that the principle of *res judicata* should extend to whatever courts were available to appellant at the time litigation was initiated. In other words, initially, appellant could have sought all three remedies claimed in the District Court. All three could have been there litigated at the same time. Appellant chose, instead, to seek a single remedy in the Justice Court. *Res judicata* should operate as a bar to reformation and declaratory judgment in A-13,503; because these are matters which, although admittedly not litigated in the Justice Court, could have been litigated at the same time the action in the Justice Court was initiated, had appellant seen fit to bring its action in the District Court.

The application of *res judicata* in accordance with the aforestated principle would bar appellant's claim to both reformation and declaratory judgment.

If this court sees fit, however, to limit the doctrine of *res judicata,* to matters actually adjudicated, appellee does not contend, under this limited application of the doctrine, that the declaratory judgment relief would be barred; but appellee does contend that, even under this limited application of the doctrine, the relief of reformation would be barred.

Appellant seems to think the remedy of a declaratory judgment might very well be *res judicata* and involve a re-determination of the meaning of the word "property".

> "Appellant in this latter complaint also asks for declaratory judgment. It is true that this could involve a redetermination of the meaning of words as used by the parties in the contract." (Appellant's Brief, p. 14.)

Although favorable to appellee, appellant cannot agree. Appellee believes that both the reformation and the declaratory judgment remedies are barred under the wide application of the *res judicata* doctrine above stated. Under the more narrow application of the doctrine, however, appellant feels that only the reformation remedy is within the doctrine.

Appellant admits that the sole question before the Justice Court was a definition of the word "property".

> "The judgment then rendered by the Justice in the Justice Court (TR p. 17) ruled that appellant was not entitled to relief, and thus, decided that the word property, contained in the agreement (TR p. 6) meant only real property and that therefore the Appellant was not entitled to the

> amount sued for which would have been due had the word property meant real and personal property.'' (Appellant's Brief, page 11.)

Appellant thus agrees that the meaning of the word property has been adjudicated; however, in keeping with his policy of vexing appellee with litigation, appellant, although it chose the Justice Court, is seeking a re-adjudication on appeal in A-13,001.

Appellant is seeking a still further adjudication of the same question in its request for reformation in A-13,503. This is true irrespective of what appellant says in its brief.

> ''In examining the complaint in Cause No. A-13,503 (TR p. 27) as to the thing sued for, or the prayer for relief in that complaint, (TR p. 31) here Appellant asks that the court reform the instrument according to the intent of the parties, further, that the Court declare certain rights and duties under the contract entered into by the party, but no allegation is made that the Court declare that the word property, as used in the contract, mean real and personal property as the Justice Court in the first case already decided that as used in the contract it meant only personal property . . .'' (Appellant's Brief, page 13.)

This statement is inaccurate, and it is believed that appellant means, in the last part of the last quotation, that the Justice Court decided that the word ''property'' meant real property instead of, as stated, ''personal property''.

Appellant's contention in the above quote, that his reformation prayer in A-13,503 merely seeks the refor-

mation of the instrument according to the intent of the parties and does not seek a declaration that the word "property" means real and personal property is plainly misleading. Of course, appellant is asking that the contract be reformed to spell out real and personal property. Why else would appellant want the contract reformed? Certainly appellant does not want the contract reformed so as to define property unequivocably as being real property. Appellant's desires in asking, in A-13,503, that there be a reformation of the instrument in accordance with the intent of the parties, were made obvious by the stipulation of April 22, 1958, filed herein subsequent to the printing of the transcript of record, but, by stipulation, made a part of the record, wherein appellant states its contention as to the true intent of the parties, namely, that the word "property" means real and personal property.

Appellant strongly contends that the reformation sought is identical to the matters adjudicated by the Justice Court and now pending in A-13,001.

In the light of the foregoing, let us examine the four essentials to *res judicata* as propounded by appellant (Appellant's Brief, page 12), quoting Mr. Justice Holmes in *Hyman v. Regenstein,* 222 Fed. 2d 545 at 549.

Appellant admits that items three and four of Mr. Holmes' requirements have been met, namely, identity of persons and parties to the action, and identity of the quality in the persons for or against whom the claim is made.

Appellant contends that point number two, identity of the cause of action, has not been met. There is but one cause of action here. Appellant is confusing multiple remedies arising out of a single cause of action with multiple causes of action.

So far as requirement number one, identity of the thing sued for, is concerned, appellee submits that the thing sued for in reformation is the identical thing decided by the justice, namely, a definition of the word "property" with the aim of collecting money under the contract. Indeed, with respect to this entire transaction, and there is but a single transaction and a single cause of action, appellant has stipulated that "the sole question to be decided herein is whether or not the word 'property' as used in said contract means real property or whether it means real and personal property." (Appellant's Brief, pages 10-11.)

SUMMARY.

Appellee contends:

1. A judgment should be affirmed although the reason for its entry, as stated, is erroneous.

2. The judgment below should be affirmed as a matter of policy favoring the expeditious determination of litigation.

3. The pendency of A-13,001 bars appellant from the reformation relief sought in A-13,503.

4. Appellant is estopped from maintaining A-13,503.

5. Appellant has waived its right to maintain A-13,503.

6. We are concerned with but a single cause of action and multiple remedies.

7. The doctrine of election of remedies bars appellant from maintaining A-13,503.

8. The Federal Rules of Civil Procedure prohibit the maintaining of A-13,503.

9. *Res judicata* prohibits the maintaining of A-13,503.

Only an affirmance of the judgment below will support the policy of the Federal Rules of Civil Procedure and the many doctrines directed to the prohibition of unjustifiable, vexatious litigation.

The judgment below should be affirmed.

Dated, Anchorage, Alaska,
April 28, 1958.

Respectfully submitted,

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By JOHN C. DUNN,
Attorneys for Appellee.